United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

382

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

24,283

UNITED STATES OF AMERICA

v.

JAMES ROUNDTREE, JR.

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
~~FOR THE DISTRICT OF COLUMBIA~~

O. B. Parker
412 Fifth Street, N. W
Washington, D. C. 20001
Attorney for Appellant
(Appointed by this Court)

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TABLE OF CASES

ISSUES PRESENTED FOR REVIEW

1. The issue is whether or not the Court should have granted the Defense motion for judgment of acquittal made at the close of the government's case and renewed at the end of the entire case.

2. The issue is whether or not the Court erred when it told the defense counsel on two occasions to sit down, in front of the jury, when the objection was reasonable.

3. The issue is whether or not the Court erred when it refused to grant a new trial based on improper arguments to the jury by the District Attorney.

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*This matter is before this Court in the first instance. It has not been to this Court previously.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

24,283

UNITED STATES OF AMERICA

v.

JAMES ROUNDTREE, JR.

Appellant

REFERENCE TO RULINGS

Court ruled the District Attorney could rehabilitate the police officer by bringing in prior consistent statements since he was impeached by defense counsel of prior inconsistent statements T/52. Denial of motion for judgment of acquittal at the close of the entire case T/115. Denial of motion for mistrial based on District Attorney's improper argument to the jury after being warned by the Court T/159. Denial of Defense Counsel to approach the bench two times in reference to District Attorney's improper argument T/139 and T/139-140.

STATEMENT OF THE CASE

Appellant, James Roundtree, Jr., was indicted by a Grand Jury for the crimes of Second Degree Burglary, 22 D. C. Code 1301 (b), and Grand Larceny 22 D. C. Code 2201.

Appellant was tried before a jury in the United States District Court for the District of Columbia and was convicted as charged. He was sentenced to a term of imprisonment of from Two (2) years to Eight (8) Years on Count 1; and Two (2) Years to Eight (8) Years on Count 2; Said sentences to run concurrently.

The Appellant noted his appeal to this Court on the same date of the sentence; April 30, 1970. The case is properly before this Court.

Mr. Roland Marcum employed at Raleigh Haberdashery located at 1310 F. Street, N. W., Washington, D. C. first testified for the government as follows:

That on Sunday the 28th day of April, 1968 he received a call and as a result of that call responded to his store in the early afternoon and went to the second floor of the building and observed that the door had been jimmed but that the door was still locked T/8. That after he went into the store he noticed certain gaps in the rack of men's suits there for alterations before being shipped to other stores.

He stated that he last examined the door on Saturday afternoon. T/9. And he could not recall any marks on the door then. After he visited the store he went down to police headquarters and talked to Detective Frye who showed him some suits in the trunk of his squad car that had alteration tags and the name of the customers to whom they had been sold T/11. He examined the clothing and they had a Raleigh's name on them. T/15.

At this time, the witness had nothing to show the value of the clothing, no notes or anything. T/17.

On cross-examination, Mr. Marcum stated that this happened a few days after the riots that was involved in the City of Washington, D. C. and that the store downtown had not been hit by the riots. T/18.

He further stated that he was the manager of the store but did not keep the records. T/19.

Edwin E. Fry stated that on April 28, 1968 he was assigned to the First Precinct, Scout Car 13 and his tour of duty was 8 to 4 P. M. and that about 12:30 he received a call to respond to Raleigh Haberdashery when he was in the eleven hundred block of Pennsylvania Avenue, N. W. He approached the store from the rear and that he saw two people coming out the rear of 1320 F. Street, N. W. that he saw the defendant who proceeded toward the car parked in the alley; coming from the doorway with clothing in his arm. T/23.

That he first saw the defendant when he was about five feet from the door. T/24. It looked like he was carrying a bundle of clothing and that he dropped it outside the doorway; and started toward the car parked in the alley approximately 20 feet west of the door. T/26. That the car was a 62 Mercury D. C. Registeration 624-39.

He arrested the defendant near the front of the automobile and that when he was arrested he had no items of clothing in his hand. T/27. We then called for a wagon, put the defendant in the wagon and picked up the suits that were laying on the ground; eight suits were scattered from the doorway to the automobile and eight more suits inside the doorway. The door was opened when he observed it and then one person ran back in the doorway at 1320 F. Street and it closed. That he was not able to apprehend that person. T/28.

He further testified that the suits had Raleigh Haberdashery labels on then. That the property was taken to the first precinct and put on the property book. T/29.

The officer stated that after the defendant was taken to the Precinct he inspected the premises of 1320 F. Street and the alley door had jimmied marks on it and that on the second floor of the alteration shop he found a jimmied door. T/34.

On cross-examination, the officer was shown a form 251 (Statement of police facts) he signed and he stated that nowhere on the form did it indicate he saw the defendant five feet from the door of Raleigh Haberdashery. He further testified that nowhere on the form did it indicate that eight suits were carried to the car by the defendant. T/38. That nowhere in this form did it indicate that the defendant had any suits in his possession with the exception "suits were recovered with the arrest of the defendant". That nothing in the form indicated that he saw the defendant leaving from Raleigh Haberdashery.

That he searched the defendant upon arrest and he found no physical evidence to indicate he had anything to do with the breaking into the store, such as screw-drivers, pliers,or hacksaws. T/40. That there were no fingerprints taken in the store. He admitted that when he fist saw the defendant he was five feet from the door and that he assumed he had been in the doorway. T/42.

The officer further stated that of the two or three items exhibited by the government to the jury, he was unable to say whether the defendant ever had any of these exhibits in his possession. T/47.

That when he got out of the automobile he was running, had his pistol out and hollered halt and that the defendant stopped T/45.

On redirect examination, Mr. Fry read to the jury the portion of the Police Department Form 251 as follows; Plaintiff's report says, place of business entered in an unknown manner and stolen 16 men's suits, Raleigh Haberdasher on label, valued at$1,420.00, suits recovered with the arrest of the above defendant. A discussion was had at the bench whether the District Attorney could rehabilitate the officer by bringing in prior consistent statements since he was impeached on his prior inconsistent statements by defense counsel T/52. The Court then held that the District Attorney could rehabilitate the police officer with a prior consistent statement where it happened to be in more detail , citing the case of Affronti v. United States, 145 F. 2d. 3. T/59-60.

Mr. Marcom was recalled by the Government, who stated "from the rear door, you go up the stairs to the first floor. That when you go in the door you are not in Raleigh's premises but in a common stairwell that is shared by other tenants. T/69. The second floor is solely occupied by Raleigh Haberdasher. The first floor was occupied by Kinsman Optical Company and an Art Company and some storerooms of Beckers. He stated after looking at the prepared list he brought to the police that the value of the suits were $1,420.00 retail.

On Redirect Examination, Officer Fry testified that on the

day of the offense he prepared a Police Department 251 and also on the same day a Police Department form 163, which he read to the jury as follows, "About 12:39 P. M. on Sunday, April 28, 1968 in response to a radio run for burglary alarm at Raleigh's Haberdasher, located at 1320 F. Street, N. W. and then arriving at the rear door, the defendant was observed leaving the rear door with an arm load of men's suits". He further stated he began to move when he saw me; this was stricken by the Court. He saw the defendant when he was 75 or 50 feet from him--that he started moving toward the automobile which was parked--that he was parked in front of the door of 1320 F. Street, N. W. T/83, --and 10 feet in front of the Mercury parked in the alley.

On recross examination, Mr. Fry was shown a copy of the Police Department form 251 and read from it as follows: "Give all details of offense, give a description of property, brand and serial numbers; use continuation report if necessary". He stated he used two pieces of paper to fill in the report. T/86. He was then asked if he had not stated as a fact on the Police Department form 163 that he had seen this defendant coming from this door of Raleigh Haberdasher. He answered he observed him leaving the rear door. Defense counsel then pointed out to him that Raleighs was actually on the second floor of this building. T/88. He further stated that he could not recall any sign there denoting Raleigh's.

The Court then ruled over defense objection that the government exhibits could be introduced as evidence. The objection was that the witness never identified these items as being part of the property in the possession of the defendant. T/89.

The government then rested its case and a motion for judgment of acquittal on the part of the defendant was denied by the Court T/91.

The defendant, James Roundtree took the stand and testified as follows: That he was 35 years of age, born in Atlanta Georgia and was a resident of the District of Columbia since he was 3 months old--went to the 10th grade and then went into the service, United States Army and received an honorable discharge. That he was married with children and at the time he was arrested he was unemployed and had been for twenty-five days; his job as a plasterer for C. A. Coates working at St. Elizabeth's Hospital had ended. T/94.

The defendant stated that on Sunday, April 28, 1968 he left home and was in the vicinity of 14th and P. Streets, N. W. when he met a fellow by the name of Judge Bean, a nickname. That he approached his car and asked me to take him to the 1300 block of F. Street, N. W., Washington, D. C.

That he took him there and he got out of the car; told him to wait around the alley for him and hewould be right back--that he parked his car in the alley and about 15 minutes later the fellow came out and said "pull up here". That he pulled up to

what was the rear of Raleigh's and was standing outside the car with the door open and about five minutes later, the police came on the scene with his pistol out one window and his other hand on the steering wheel of the automobile. He told the police he was not moving and put his hands up. T/96. And about this time the person whom he came there with came out the rear door with clothing in his hands. T/97.

Defendant said he never went out socially with Judge Bean, did not go to school with him and never did know his real name; but had seen him in the area of 14th Street, N. W. That he had no discussion with him of what he was going to do in the alley. That the defendant never entered Raleigh's himself or the door leading upstairs to Raleigh's. T/98.

He stated he never had any suits in his hands on this date and did not see the officer recover any suits in the alley. T/99. That when he got to the precinct the police asked him about some suits. T/100.

On Cross-examination, the defendant stated he could not recall what he and Judge Bean discussed on the way to the 1300 block of F. Street, N. W. That he had seen him 3 or 4 times before this incident. He drove into a T alley of the whole 1300 block of F. Street, N. W. T/105. That he had gotten out of the automobile to urinate before the police arrived. T/108. He stated that the police arrived on the scene simultaneous at the same time Judge Bean stepped cut of the doorway.

He denied seeing any suits between the door and his car. He said Judge Bean stepped back into the doorway and that was the last time he seen him T/110.

On Redirect Examination, the defendant stated he had no reason to know Judge Bean was doing anything wrong down in the alley. T/110. He had not told him anything about what he was going to do in the alley. T/111.

The defense rested and renewed its motion for judgment of acquittal at the close of the entire case which was denied by the Court. T/115.

Defense counsel objected to the District Attorney's argument that the defendant had a vital interest in the case and they should not believe the defendant and believe the police officer since he had no interest in the case. The Court refused to allow defense counsel to come to the bench and state the reasons for this objection. T/139. THE COURT: Mr. Parker, will you not interrupt him any more. I think I can take care of whatever you have to complain about in my charge.

MR. KELLY: Ladies and Gentlemen, ask yourself if the officer does have any interest in telling a falsehood as the defendant does? Ask yourself whether you would come in and jeopardize your career by telling a falsehood?

THE COURT: Come up here now. THE COURT: We are in an unwarranted area. I know somebody asked that an instruction be given that a policeman does not have an interest in a case. The Court of Appeals denied that request.

I dont think you can realistically indicate the police officer has any interest in this case. And everybody who goes to the police force wants to be chief some day and everybody does not get to be chief by alignming somebody who does not get convicted. I dont think you can argue the policeman does not have an interest in the outcome of the case.

I think both of them have an interest in the outcome of the case. I think it is unfair and I think it is untrue for you to infer that a policeman is a completely disinterested witness, in this case, especially from my experience in Court. I have been in Court and there are so many who have colored the truth. I dont want to go into that because if you do, I am going to let him come back and argue that he does have an interest and get stripes for performance by virtue of their performance. Their efficiency ratings depend upon the arrests and convictions."

After this instruction the District attorney then stated to the jury as follows:

MR. KELLY: "Just to summerize this case, ladies and gentlemen, the defense is asking you to conclude that the officer has told a falsehood in this case. Certainly it would be a terrible thing if a man come in here and swear to tell the truth and wilfully tell a falsehood which would effect a man's liberty. It would be a terrible thing to do."

For the second time the defense arose and tried to go to the bench and object and for the second time he was told in front of the jury as follows:

THE COURT: Mr. Parker, now do not get up anymore I told you I would instruct these people. T/139-140.

After certain instructions were given to the jury the Court called counsel to the bench and asked for complaints. T/158. At this time defense counsel stated that this was the first time he had an opportunity to complain about the District Attorney stating that the police officer had no interst in the case and that his argument was unfair even after the Court had warned him. Defense counsel stated that "I think it has gone so far that this defendant could not get a fair trial". T/159. A motion for a mistrial was made and denied by the Court.

ARGUMENT

1. The Judgment of acquittal should have been granted

"The true rule is that a trial Judge, in passing upon a motion for directed verdict of acquittal (now motion for Judgment of Acquittal FRCP 29 (a)) must determine whether upon the evidence giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inference of facts, a reasonable mind might fairly conclude guilt beyond a reasonable doubt". Curley v. United States 81 U. S. App. D. C. 389-392, 160 F. 2d 229,232 (1947). "If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it in another way, if there is no evidence upon which a reasonable man might fairly conclude guilt beyond a reasonable doubt, the motion must be granted." Cooper v. United States 94. U. S. App. D. C. 346, 213 F. 2d 42.

In the instant case, other than identification of the property and its value by the manager of the Raleigh Haberdasher, the case was a two witness case; that is testimony of the defendant, James Roundtree and Officer Fry.

Here the officer's testimony was of such a nature that he had to be rehabilitated by the Assistant District Attorney by bringing in prior consistent statements, T/52, since he was impeached by defense counsel of prior inconsistent statements.

In parts of his testimony he assumed T/42 certain facts not consistent with what he wrote on his official police reports of the incident.

The property exhibited by the government was not identified as that in any way in possession of the defendant T/147. The value of the property was primarily that of what the policeman listed on the property books T/78-79.

These premises considered, the appellant respectfully submits the judgment of acquittal should have been granted at the close of the entire case, on motion of the defendant.

2. Was the court in error in telling Defense Counsel to sit down, in front of the jury, when he had a reasonable objection

Appellant's counsel alleges that the trial Court in refusing to allow him to come to the bench and object to unfair argument by the Assistant District Attorney and telling the Attorney to sit down, in front of the jury, prejudiced the appellant's case.

Without citing any particular case, it is common knowledge that the jury looks to the judge as to any indication of guilt or innocence of the defendant.

Here in the instant case, the Court after refusing to allow Counsel to come to the bench had to call the District Attorney to the bench and warn him he was in a unwarranted area and that his argument was unfair T/139-140.

However, this did not seem to faze the District Attorney as his next statement was as follows: MR. KELLY: "Just to summarize the case ladies and gentlemen, the defense is asking you to conclude that the officer has told a falsehood in this case. Certainly it would be a terrible thing if a man who had come in here and swear to tell the truth and wilfully tell a falsehood which would effect a man's liberty. It would be a terrible thing to do".

This placed appellant's attorney in this position, he tried to object to an unfair argument - - was told to sit down in front of the jury - - then the Court called the District Attorney to warn him his argument was unfair. The District Attorney disregarded this warning and then said the defense is asking you to conclude the officer had told a falsehood. The Defense Attorney then tries to object again and was told by the Court to sit down again in front of the jury T/140.

These actions on the part of the Court could have led the jury to believe the defendant guilty and thus prejudiced his case and prevented him from obtaining a fair trial.

3. The Court erred in refusing to grant a mistrial.

It is basic to the American system of criminal law that an accused be tried and either convicted or acquitted upon the facts in evidence. It is the primary duty of the prosecutor to see that "justice" is done and the rights of all

are protected. Brady v. Maryland 373 U. S. 83, 83 S. Ct. 629. Persuasion should be used only to interpret proof and not as a substitute for evidence.

A defendant on trial for any criminal charge is entitled to a fair trial. And one of the essential elements of a fair trial is that the District Attorney should be scrupulous in the statements that he makes in his summation to the jury; that he should refer only to such facts as were established by the evidence and make fair comment thereon; that he should not appeal to the prejudices of the jury, or seek to inflame the jury by his remarks nor should he state his opinion of the innocience or guilt of the accused. People v. Vario, 257 App. Div. 975, 13 N. Y. S. 2d 41.

The obvious dangers in allowing such remarks are that the jury may take and accept unproven facts as true and may be overly impressed with the office of the prosecutor. Berry v. Comm. 227 Ky. 523 S. W. 2d 521.

Appellant contends that a mistrial should have been granted in that the prosecutor's remarks "that you should believe the officer and disbelieve the defendant since he had such a great interest in the case prejudiced his case and prevented him from obtaining a fair trial in this case. Also the remarks of the trial judge telling the defense counsel to sit down when he was attempting to prevent the District Attorney from this improper argument, prevented the defendant from obtaining a fair tial and the motion for mistrial should have been granted.

CONCLUSION

In consideration of the premises herein, appellant moves that his conviction be reversed, the case be remanded back to the lower Court and that a new trial be ordered.

O. B. PARKER
Attorney for Appellant
412 5th Street, N. W.
Washington, D. C. 20001
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,283

UNITED STATES OF AMERICA, APPELLEE

v.

JAMES ROUNDTREE, JR., APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THOMAS A. FLANNERY,
United States Attorney.
JOHN A. TERRY,
C. MADISON BREWER,
Assistant United States Attorneys.

Cr. No. 721–68

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TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

418-901—71

ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

I. Whether evidence that appellant was found outside a recently burglarized clothing store holding loot from that store was sufficient to sustain his convictions for burglary in the second degree and grand larceny?

II. Whether it was permissible for the prosecutor to suggest in his closing argument that appellant had an interest in the outcome of the trial, or to tell the jurors that appellant should be acquitted if they believed that the police officer wilfully told a falsehood?

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*This case has not previously been before this Court.

United States Court of Appeals

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JAMES ROUNDTREE, JR., APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By an indictment filed June 5, 1968, appellant was charged with burglary in the second degree and grand larceny, in violation of 22 D.C. Code § 1801 (b) and § 2201, respectively. On November 12 and 13, 1969, appellant was tried by a jury before the Honorable William B. Bryant and was found guilty as charged. On April 30, 1970, appellant was sentenced to two to eight years on each count, the sentences to run concurrently. This appeal followed.

The Offense

Sometime after 12:30 p.m. on Sunday, April 28, 1968, while he was operating a police scout car, Officer Edwin Fry responded to a radio run directing him to Raleigh Haberdasher at 1320 F Street, Northwest. As he approached the store's rear alley entrance, the officer found appellant approximately five feet from the open door with some clothing in his arms. An unidentified man who was in the doorway ran back inside, closed the

door behind him and escaped. Appellant dropped his burden and walked toward his nearby automobile, where he was thereupon arrested. Approximately eight men's suits were scattered between Raleigh's doorway and appellant's car. Other suits were recovered just inside the doorway.[1] In all, sixteen men's suits bearing Raleigh labels, with an aggregate retail value of $1420, were recovered. Examination of the alley door to 1320 F Street revealed jimmy marks. The second-floor door to the Raleigh alteration shop had similar marks (Tr. 22–34).

After appellant's apprehension, Mr. Roland Marcom, the store manager, was summoned to the scene. He could recall no marks on the door when he had closed the store the evening before (Tr. 8–9, 71). He inventoried the recovered goods[2] (Tr. 6–16, 69–79).

The Trial

On direct examination, Officer Fry stated that as he approached the store from the rear, he saw two people coming out of the rear of 1320 F Street, one of whom was inside the open door while the other, identified as appellant, was approximately five feet outside (Tr. 23–24). Appellant was carrying clothing in his arms which he dropped just before his apprehension (Tr. 23, 25–27). The men's clothing, recovered from the alley and from inside the premises, was initialed and dated by the officer (Tr. 29).

Appellant's counsel,[3] after scrutinizing the "Offense Report"[4] prepared by Officer Fry, elicited the fact that the officer's testimony regarding the offense was somewhat more detailed than the infomation recorded on the report form (Tr. 37–40). Office Fry also stated that no physical evidence such as burglary tools had been recovered from appellant, nor was appellant

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[1] These were apparently dropped by the unidentified second man (Tr. 47, 96–97).

[2] It was he who, adding the prices from the original sales tickets, testified to the value of the merchandise (Tr. 79). Although sixteen suits were recovered, all but one suit and one jacket (Government's Exhibits 1–A, 1–B, and 2) were returned to the store prior to trial (Tr. 16).

[3] At trial appellant was represented by the attorney who represents him on this appeal, as well as by a co-counsel.

[4] Form PD–251.

carrying clothing at the precise moment that he was placed under arrest. The officer did not know whether any fingerprint tests were made at the burglary scene (Tr. 40–41, 47).

The prosecutor, on redirect examination, asked the officer to read that portion of the offense report relevant to the charges before the court.[5] The officer read as follows:

> Plaintiff's report says, place of business entered in an unknown manner and stolen 16 men's suits, Raleigh Haberdasher on label valued $1420.00. Suits recovered with the arrest of the above defendant. (Tr. 50.)

The prosecutor then elicted testimony that in addition to the offense report Officer Fry had prepared a "Statement of Facts."[6] At that point a bench conference ensued, and appellant's counsel objected to the prosecutor's line of questioning, arguing that the Government was impeaching its own witness (Tr. 51). The prosecutor, characterizing the defense cross-examination of Officer Fry as impeachment, argued that the Government was entitled to rehabilitate the policeman through use of the PD–163. Appellant's counsel objected to the admissibility of that report (Tr. 51–52). The court recessed without ruling on the prosecutor's request but, upon reconvening the following day, ruled that the prosecutor could use the second report, noting that this case involved an officer "who had put some clothes on a bare-boned statement in a four-line offense report. Now if you [the prosecutor] have a statement which originally would be putting more clothes on it, I think you could use it" (Tr. 60). Pursuant to a request by defense counsel, the court agreed to caution the jury that the use of the prior statement was only for the purpose of rehabilitation (Tr. 62, 64). Although appellant's counsel had first stated that he had no objection to the admission of the second statement, he later objected vigorously (Tr. 60, 66).

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[5] The balance of the report dealt with narcotics paraphernalia recovered from appellant and with narcotics recovered from his car. No charges regarding such evidence were before the court.

[6] Form PD–163.

The prosecutor had the officer read the first sentence from the PD–163 which he had prepared: [7]

> At about 12:30 p.m. on Sunday, April 28, 1968, in response to a radio run for burglary alarm at Raleigh Haberdasher, located at 1320 F Street, Northwest and when arriving at the rear door, the Defendant was observed leaving the rear door with an armload of men's suits. (Tr. 82.)

After further testimony from the officer about the details of appellant's arrest, the court instructed the jury that the prior written statements were admitted solely for the purpose of evaluating the credibility of the witness (Tr. 84).

Before pursuing re-cross examination, appellant's counsel had the officer read for the jury the instructions for filling out a Form PD–163. These were:

> Give all details of the offense; give a description of property, brand and serial numbers; use continuation report if necessary. (Tr. 85.)

Over objection, the clothing recovered by Officer Fry was admitted into evidence (Tr. 88–89). Appellant's motion for a judgment of acquittal was denied (Tr. 89–91).

Appellant, the sole defense witness, after describing his life-long residency in the District of Columbia, his educational background, his military service record (including the fact that he was honorably discharged), and his employment background, denied committing the offenses charged (Tr. 92–94). He stated that while driving his car in the vicinity of 14th and P Streets, Northwest, he picked up an acquaintance known to him only by the nickname of Jud Bean.[8] Without further elaboration this individual requested appellant to drive him to the 1300 block of F Street, and then requested that appellant wait for

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[7] The rest of the statement dealt with the narcotics and narcotics paraphernalia recovered by the officer, or otherwise reiterated prior testimony (*e.g.*, the number of suits recovered and their value).

[8] Throughout appellant's testimony he identifies his companion as "Jud." During argument to the jury, appellant's counsel for the first time used the name "Judge" (Tr. 133). Thereafter the court itself adopted the latter name in referring to appellant's companion (Tr. 156).

him in the alley. Appellant acceded, and after about a fifteen-minute wait in the alley, Jud appeared and suggested that appellant pull his car up to what turned out to be the rear door to Raleigh's. Appellant had gotten out of his car to urinate and was merely standing beside the vehicle, awaiting Jud's return, when the police came upon the scene. As the scout car arrived, appellant saw Jud emerging from the door, carrying an armload of clothing; he last saw his companion escaping back into the building (Tr. 94–109). Appellant was arrested and put in the wagon so fast that he did not see or know about the suits found by the officer (Tr. 99–100).

At the close of appellant's case the motion for judgment of acquittal was renewed and was again denied (Tr. 114–115).

During argument to the jury, the prosecutor noted that appellant had claimed to have acceded to Jud Bean's various requests without ever questioning the purpose or motive behind them. Appellant's counsel, interrupting the argument, objected to what he characterized as proving an affirmative by arguing a negative. The objection was overruled, and the court denied appellant's request for an instruction that the Government cannot prove any fact by arguing in the negative (Tr. 125–126). During the prosecutor's rebuttal argument appellant's counsel again interrupted, requesting a bench conference after the prosecutor, in commenting on the credibility of witnesses, stated that the jury was entitled to consider the defendant's vital interest in the outcome of the trial. At that point the court interjected:

> THE COURT: Mr. Parker [defense counsel], will you not interrupt him any more? I think I can take care of whatever you have to complain about in my charge. (Tr. 139.)

The prosecutor then continued:

> Ladies and gentlemen, ask yourselves if the officer does have any interest in telling a falsehood as the defendant does? Ask yourselves whether you would come in and jeopardize your career by telling a falsehood? (Tr. 139.)

The court then summonded counsel to the bench, stating:

> THE COURT: We are in an unwarranted area. I know somebody asked that an instruction be given that a policeman does not have an interest in a case. The Court of Appeals denied that request.
>
> I do not think you can realistically indicate the police officer has any interest at all in this case. They do have an interest in this case. And everybody who goes to the police force wants to be chief someday and everybody does not get to be chief alignming [*sic*] somebody who does not get convicted. I do not think you can argue the policeman does not have an interest in the outcome of the case.
>
> I think both of them have an interest in the outcome of the case. I think it unfair and I think it is untrue for you to infer that a policeman is a completely disinterested witness in this case, especially from my experience in court. I have been in court and there are so many who have colored the truth. I do not want to get into that because if you do, I am going to let him come back and argue that he does have an interest and gets stripes for performance by virtue of their performance. Their efficiency ratings depend on the arrests and convictions.
>
> All right. Let us go on. (Tr. 139–140).

The prosecutor then continued:

> Just to summarize the case, ladies and gentlemen, the defense is asking you to conclude that the officer has told a falsehood in this case. Certainly it would be a terrible thing if a man who had come in here and swear [*sic*] to tell the truth and wilfully tell [*sic*] a falsehood which would effect a man's liberty. It would be a terrible thing to do. (Tr. 140.)

At that point appellant's counsel for the third time interrupted the proceedings, eliciting the following response:

> THE COURT: Mr. Parker, now do not get up any more. I told you that I would instruct these people. (Tr. 140.)

The prosecutor resumed his rebuttal argument:

> If you believe that the officer has done so, of course, you should acquit this defendant. Again the Govern-

ment would say to you, consider the evidence carefully and give it the attention it merits and render a verdict according to the evidence. (Tr. 140.)

Among the initial instructions given to the jury was the following:

> [Y]ou are the sole judges of the credibility of the witnesses. In other words you, and you alone, are to determine whether to believe any witness and the extent to which any witness should be believed.
>
> If there is any conflict in the testimony it is your responsibility to resolve that conflict and to determine where the truth lies. In reaching a conclusion as to the credibility of a witness and in weighing the testimony of a witness you may consider any matter that may have a bearing on that subject. You may consider the demeanor, the behavior of the witness on the witness stand; the witness' manner of testifying; whether the witness impresses you as a truthful individual; whether the witness impresses you as having an accurate memory and recollection; whether the witness has any motive for not telling the truth. You may consider whether the witness had full opportunity to observe the matters to which he testified; whether the witness has any interest in the outcome of this case or friendship or animosity toward other persons concerned in this case.
>
> You may consider the reasonableness or unreasonableness, the probability or improbability of the testimony of a witness in determining whether to accept it as true and accurate. You may consider whether he has been contradicted or corroborated by other credible evidence in the case. If you believe that any witness has shown himself to be biased or prejudiced either for or against either side in this trial, you may consider and determine whether such bias or prejudice has colored the testimony of such witness so as to affect the desire and capability of that witness to tell you the truth. (Tr. 147–148.)

After the court had initially instructed the jury, counsel for appellant again objected at a bench conference to the prose-

cutor's argument and moved for a mistrial. The court denied appellant's motion but then, *sua sponte*, gave the jury additional instructions, which included the following:

> THE COURT: Ladies and gentlemen, during the course of my instructions to you in giving you some guidelines to aid you in your tremendous task of determining where the truth lies, assessing credibility, I indicated to you that among the many things that you have a right to take into account was the fact of the question of whether or not the witnesses had any interest in the outcome of the case or friendship or animosity toward other persons concerned in this case.
>
> During the course of argument I believe one of the counsel indicated to you that a great deal of motivation on the part of one witness because of the tremendous interest he had in the outcome of the case, and that there was absolutely no interest in the outcome of the case on the part of the other witness. The court instructs that it is for you to determine whether or not there is any motivation on the part of any witness by reason of his interest in the outcome of the case. That is for you to determine and you determine that from all that you have seen in this courtroom and from the evidence.
>
> I just want to caution you again that this is consistent with the admonition which I gave you at the outset. I told you what was evidence, and one of the things that I told you was not evidence was statements and arguments of counsel. That they were not evidence. They just pointed out certain aspects of the evidence that you [*sic*] wished you to consider. (Tr. 162.)

It took the jury one hour and fifteen minutes to decide that appellant was guilty as charged (Tr. 164).

ARGUMENT

I. The evidence was sufficient to sustain appellant's conviction.

(Tr. 8–10, 23–29, 32, 37–40, 96–97)

Appellant suggests that for two reasons the court erred in not granting his motion for judgment of acquittal. He first

attacks the credibility of the police officer's testimony and secondly argues that the stolen property was not shown to have been in his possession. We submit that both arguments are without merit.

It is well settled that on appeal, if the evidence is asserted to be insufficient, it must be reviewed in the light most favorable to the Government, with full allowance made for the right of the jury to assess credibility of witnesses and to draw justifiable inferences from the evidence adduced at trial. *Crawford* v. *United States,* 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States,* 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied,* 331 U.S. 837 (1947). It is not necessary that the evidence rule out every reasonable hypothesis but that of guilt; it is sufficient if a reasonable man *could* find guilt beyond a reasonable doubt. *Curley* v. *United States, supra,* 81 U.S. App. D.C. at 392, 160 F.2d at 232.

On the basis of the direct and circumstantial evidence presented in this case, the trial court properly denied appellant's motion for judgment of acquittal. Officer Fry, upon entering the alley, found appellant a few feet from the rear door of Raleigh Haberdasher. Appellant was at that moment carrying an armload of clothing which he dropped as he started toward his car, which was parked nearby (Tr. 23–27). When the officer first sighted appellant, he saw another individual as well, also carrying clothing, just inside the doorway of Raleigh's (Tr. 23, 46–47). He saw appellant's companion drop the clothes that he was carrying, step back inside the doorway and close the door (Tr. 28, 46–47). Although appellant was not carrying anything at the precise instant of his arrest, the intellect does not rebel at the inference that those clothes recovered from the alley were the same ones appellant had been carrying and had dropped to the ground seconds before. The officer stated that after appellant's arrest he recovered eight men's suits scattered in the alley between the rear door of Raleigh's and appellant's parked car; he recovered eight more suits from just inside the door. All of the recovered clothing was initialed and dated, and those markings were identified at trial (Tr. 28–32). It does not offend reason to infer that the suit introduced were dropped by either appellant or his somewhat more fortunate accomplice. offend reason to infer that the suit and coat introduced were dropped by either appellant or his somewhat more fortunate

accomplice. The fact that those clothes bore Raleigh labels and alteration tags might well lead a reasonable person to conclude that they had been carried from the burglarized establishment by those who had committed the burglary. That conclusion is reinforced by the recently inflicted burglary marks on the establishment's doors,[9] the proximity of appellant to the outer door,[10] and by the quick disappearance of "Jud Bean." Indeed, on the facts presented by this record, any conclusion other than the one reached by the jury would be palpably irrational.[11]

II. The prosecutor's argument was proper.

(Tr. 124–140)

Appellant suggests that the prosecutor prejudicially substituted "persuasion" for evidence in his summation by stating that, in weighing the credibility of witnesses, the jury could consider appellant's interest in the outcome of his trial. He argues that the prosecutor's remarks as given constituted grounds for a mistrial and now require reversal. We think otherwise.

Appellant's argument is based upon the erroneous premise that his latter two objections were based upon the same prosecutorial transgression. He suggests:

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[9] The manager of Raleigh's F Street Store testified that he could recall no marks being on the doors when he closed the shop the preceding evening. He described the door to the alteration shop itself as bearing "chew" marks around the lock, such as would have made by a chisel or screwdriver (Tr. 8–10).

[10] Officer Fry stated that, as he approached the rear of the store, he saw two people coming out the rear door and that one of them was in the doorway itself, with the door open, while the other one, appellant, was approximately five feet outside the door (Tr. 23–24).

[11] With more tenacity than cause, appellant argues that "the officer's testimony was of such a nature that he had to be rehabilitated . . . in parts of his testimony he [the officer] assumed certain facts not consistent with what he wrote on his official reports of the incident" (Brief for appellant at 13–14). We submit that a careful reading of the record demonstrates this characterization of the officer's testimony to be somewhat distorted. The most that can be said for the cross-examination of the officer was that counsel was able to make much ado about the officer's rather cursory PD–251, the offense report (Tr. 37–40). Moreover, the assessment of the credibility of witnesses is a function of the trier of fact. *Johnson* v. *United States*, 138 U.S. App. D.C. 174, 426 F.2d 651 (*en banc*), *cert. granted*, 400 U.S. 864 (1970).

> Here in the instant case, the Court after refusing to allow counsel to come to the bench had to call the District Attorney to the bench and warn him he was in a [*sic*] unwarranted area and that his argument was unfair.
>
> However, this did not seem to faze the District Attorney. (Brief for appellant at 14–15.)

Appellant thus implies that the prosecutor's argument was initially unfair; that defense counsel properly attempted to object but was prevented from doing so by the court, which then had to take the prosecutor to task; and that the prosecutor continued undaunted, aided at least by the court's second refusal to allow objection by defense counsel. This we submit is a patently inaccurate interpretation of the proceedings.

During his closing argument the prosecutor stated:

> Now, ladies and gentlemen, we now get to the defendant's account of what occurred that particular day. You are entitled, for instance, to keep in mind that the defendant has a very vital interest in the outcome of this lawsuit. You are entitled to consider that vital interest may outweigh his desire to tell the truth as a witness from the witness stand. You may do so. (Tr. 124.)

Appellant's counsel did not object to this argument at the time.[12] During his own argument appellant's counsel crystallized the issue for the jury:

> So what does this case come down to, ladies and gentlemen? To do away with all the big words, *the case involves whether you are going to believe this police officer or whether you are going to believe the defendant.* I am not here, ladies and gentlemen, to tell you that some one person is lying and another person is telling you the truth. All I am trying to do is to bring out to you what was said there on the stand. (Tr. 131) (emphasis added).

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[12] A short time thereafter appellant's counsel interrupted the prosecutor's summation to object to what he termed "proving an affirmative by arguing a negative" (Tr. 125).

During rebuttal argument the prosecutor again turned to the issue of credibility:

> Mr. Parker has stated that in his view this case comes down to credibility. Do you believe the policeman or do you believe Mr. Roundtree? You are entitled to consider, of course, that the defendant does have a vital interest in the outcome—(Tr. 139).

At that point appellant's counsel interrupted and asked leave of court to approach the bench. The court denied the request and assured counsel that any complaint about the argument would be taken care of in the charge to the jury (Tr. 139).

Appellant suggests that the prosecutor's argument was unfair. In reality it was but an accurate reiteration of the argument which had just been made, by appellant's own counsel, coupled with the prosecutor's comment about appellant's interest in the case—a comment which he had previously made and to which there had been no objection. At this point no comment had been made regarding the officer's testimony. Thus appellant's characterization of the ensuing interruption of the proceedings is inaccurate. At this point appellant's counsel could not have been objecting to the juxtaposition of the witnesses' credibilities. We can only conclude that his interruption of the prosecutor's argument must have been based upon some objection other than that which he now advances.[13] We maintain, furthermore, that the prosecutor's reference to appellant's interest in the outcome of his trial was quite proper. *See United States* v. *Gaither*, D.C. Cir. No. 23,636, decided February 12, 1971; *United States* v. *McCleary*, D.C. Cir. No. 23,142, decided June 30, 1970 (without opinion); *Fisher* v. *United States*, 80 U.S. App. D.C. 96 149 F.2d 28 (1945), *aff'd*, 328 U.S. 463 (1946).

The prosecutor continued:

> Ladies and gentlemen, ask yourselves if the officer does have any interest in telling a falsehood as the defendant does? Ask yourselves whether you would come in and jeopardize your career by telling a falsehood? (Tr. 139.)

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[13] See, *e.g.*, Brief for appellant at 16.

It was at that point that the court summoned counsel to the bench and indicated that the argument was *at that point* in an unwarranted area because, in the court's view, both witnesses had an interest in the outcome of the case (Tr. 139–140). In the words of the court:

> I think it unfair and I think it is untrue for you to infer that a policeman is a completely disinterested witness in this case, especially from my experience in court. I have been in court and there are so many who have colored the truth. I do not want you to get into that because if you do, I am going to let him come back and argue that he [the policeman] does have an interest and gets stripes for performance by virtue of their performance. Their efficiency ratings depend upon the arrests and convictions. (Tr. 140.)

Assuming *arguendo* that the prosecutor was in an unwarranted area, a close reading of the record indicates that he was there for the first time. Moreover, once warned, he did not return to that line of argument.

> Just to summarize the case, ladies and gentlemen, the defense is asking you to conclude that the officer has told a falsehood in this case. Certainly it would be a terrible thing if a man who had come in here and swear [*sic*] to tell the truth and willfully tell [*sic*] a falsehood would effect a man's liberty. *It would be a terrible thing to do.* (Tr. 140) (emphasis added).

At that point appellant's counsel managed for the third time to interrupt the argument but was rebuked by the court. The prosecutor then continued:

> If you believe that the officer has done so, *of course, you should acquit this defendant.* Again the Government would say to you, consider the evidence carefully and give it the attention it merits and render a verdict according to the evidence (Tr. 140) (emphasis added).

At the bench conference following the court's initial instructions, appellant's counsel complained that the basis for the objections which he had not been allowed to articulate was the

undue emphasis placed on the fact that the police officer had no interest in this case while appellant had such an interest. He objected to what he termed the Government's attempts to discredit his client's testimony (Tr. 158–159).

A close reading of the record indicates that while appellant's argument, both at trial and on appeal, might be applicable to the "unwarranted area" into which the prosecutor briefly strayed, it has no merit regarding the prosecutor's statements after the court's warning. Appellant's vociferous objections notwithstanding, we submit that the prosecutor did not argue facts which were not in evidence.[14] We also note that the court went to great pains in its instructions to correct any unfairness, real or imagined, concerning the prosecutor's comments. The court carefully told the jury that the statements and arguments of counsel were not evidence (Tr. 142–144). The court meticulously explained the factors which the jury might assess in judging the witnesses' credibility (Tr. 146–148). Moreover, after the initial instructions and the final bench conference, the court *sua sponte* gave the jury an extensive further instruction regarding the interests of the witnesses, telling the jurors among other things that it was for them to consider whether *any* witness had an interest in the outcome of the case (Tr. 161–162). This instruction, we submit, cured any defect, if indeed there was any, in the prosecutor's argument.[15]

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[14] The objection of appellant's counsel, upon close examination, seems to be concerned more with rhetoric than with substance (Tr. 160).

[15] Appellant suggests the court's refusal to allow his counsel to approach the bench and articulate his objection to the prosecutor's argument prejudiced his case. He reasons, "Without citing any particular case, it is common knowledge that the jury looks to the judge as to any indication of guilt or innocence of the defendant" (Brief for appellant at 14), and then concludes that somehow the jury's verdict was influenced by the court's actions. This argument is patently frivolous.

We note also that during trial appellant objected to the introduction of the policeman's statement of facts, a more complete statement than the one first introduced. Appellant has abandoned this contention on appeal, but even so, the court did not err in allowing the Government to introduce the second report. *Coltrane* v. *United States*, 135 U.S. App. D.C. 295, 304, 418 F.2d 1131, 1140 (1969); *Copes* v. *United States*, 120 U.S. App. D.C. 234, 345 F.2d 723 (1964); *Affronti* v. *United States*, 145 F.2d 3 (8th Cir. 1944).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.
JOHN A. TERRY,
C. MADISON BREWER,
Assistant United States Attorneys.

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